IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION

JOHN McGUINNESS, DIANE ELLER, JESS V. CLAMPITT, JR. and RONNIE CLAMPITT, ROBERT and EARLENE von der OSTEN, STEPHEN ZUCKER, NANCY MOSTELLER, JOHN MAKAR and AURELIA STONE,	)	**Civil Action No. 1-15-CV-72**
Plaintiffs,	)	**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**
vs.	)	
UNITED STATES FOREST SERVICE,	)	**Request for Oral Argument**
Defendant.	)	

I. STATEMENT OF FACTS

At an unknown date prior to January 11, 2002, Defendant requested that a private group of citizens form an official organization to take responsibility for a rifle range in Clay County, North Carolina, in the Tusquitee District of the Nantahala National Forest. Administrative Record, Part 2 ("AR/2") 3424; Administrative Record, Part 1 ("AR") 11. On or about January 11, 2002, James Ledford spoke with the Nantahala National Forest's Tusquitee District Ranger Charles Miller via telephone and indicated that he and other private citizens had fulfilled Defendant's request by establishing the CCSC. *Id.* Ledford also informed Ranger Miller that the CCSC was willing and able to handle any construction, operation and/or maintenance responsibilities that would be required of them in order to implement the Project. *Id.*

Defendant followed the aforementioned January 2002 telephone conversation with an eleven-year project planning process that involved three rounds of public comment and environmental review under NEPA. Defendant's Answer ("Answer")(Dkt #4) ¶ 21; AR 12. Defendant solicited public comments on the Project in November 2002, May 2005, and October 2007. Answer (Dkt #4) ¶ 22. Over this period, Defendant received hundreds of comments from the public, including a consistent and voluminous stream of comments from a large, diverse and broad-based array of local residents and area recreationists who staunchly opposed the project due to a long list of substantive concerns. *See, e.g.,* AR 420-21, 449, 528, 540, 560-62; AR/2 2591-2, 2662, 2680, 2707, 2791-2, 3210, 3229. Among the comments received by Defendant in favor of the Project was a 2002 letter from the Eastern Regional Director of the National Rifle

Association, who pledged his "total support" for Defendant's proposal to host an "unsupervised shooting facility on National Forest lands . . ."[1]. AR/2 2329.

On or about October 14, 2004, North Carolina's Secretary of State suspended the CCSC's articles of incorporation for failure to comply with the requirements of the North Carolina Department of Revenue pursuant to N.C.G.S. § 105-230(a), rendering any act or attempted act of the CCSC during the period of suspension invalid and of no effect, per N.C.G.S. § 105-230(b). AR 294-97. In October of 2008, CCSC entered into a bilateral contract with Defendant whereby CCSC promised to pay Defendant $2,800.00 towards Defendant's NEPA public comment and environmental review costs, in exchange for Defendant's promise to carry out the NEPA review for the Project. *Id.* at 13; AR/2 2319.

Defendant issued a first Environmental Assessment on the project for public review and comment in May of 2010. Answer (Dkt #4) ¶ 23. In October of 2010, Defendant issued its first Decision Notice approving the Range at a site near Perry Creek. *Id.* at ¶ 24. After objections from Plaintiffs, Defendant withdrew its first Decision Notice in January of 2011, explaining that additional impacts analysis regarding noise, traffic and dust was warranted. *Id.* at ¶ 25.

On or about April 17, 2012, several of the Plaintiffs notified Defendant via email, and through prior counsel, of the CCSC's suspension by North Carolina's Secretary of State. AR 298-99. On or about April 19, 2012, Defendant confirmed via official agency email that Defendant's staff involved in planning for the Project were aware of CCSC's suspension and had discussed the issue amongst themselves in detail. AR 300. The email acknowledged that CCSC would be entering into an agreement with Defendant to build and maintain the facility to Defendant's

[1] This comment was received at a time when another site called Birch Cove was being considered for the Project. AR 25.

specifications, but it stated that there are “no CFR statutes establishing preconditions that individuals and groups must meet prior to entering into volunteer agreements with the Forest Service.” *Id.* In fact, as Defendant’s staff explored how to handle CCSC’s suspension issue, Defendant was warned by agency staff that CCSC’s suspension would have to be cleared by the Secretary of State before Defendant could work with them. AR 1151-52. In an April 18, 2012 agency email, Ruth Berner, Forest Planner for Defendant, stated:

> [t]his is a judgment call; we can set the bar however we want so long as it makes sense, but we would want to document our rationale in the DN due to the issue being raised.

AR 640.

In August of 2012, Defendant issued a revised Environmental Assessment for public review and comment. AR/2 1475. Defendant’s cover letter for this comment period explains that approval of the project would result in the CCSC building a shooting range in the national forest. AR/2 at 1474. In June of 2013, Defendant issued a second Decision Notice and approving the Range at the Perry Creek site, and describing the purpose of the Project as arising from a request of the CCSC for a firing range. AR/2 at 1653, 1655. However, Defendant’s June 2013 Decision Notice, Finding of No Significant Impact and the accompanying second Environmental Assessment are all silent as to issue of CCSC’s standing with the North Carolina Secretary of State. AR/2 at 1653-57, 1658-1814. In August of 2013, Defendant withdrew its June 2013 Decision Notice and re-issued its Environmental Assessment (the final “EA”), citing faulty publication of the notice of opportunity for public comment on the August 2012 Environmental Assessment. AR/2 1862-63. In September of 2013, Defendant finally issued the DN and EA at issue in this matter. AR 1, 7.

Defendant's EA describes the origin of the Project as a 2002 request from the CCSC for the Forest Service to provide a site on the Tusquitee Ranger District in Clay County, North Carolina for a public outdoor shooting range. AR 12-13. The EA states:

> [T]he CCSC proposed entering into a volunteer agreement through which, at CCSC expense, it would . . . [b]uild a shooting range to Forest Service standards, including backstops, covered shooting stations, and road improvements; [and] [m]aintain the facility in perpetuity . . .

Id. In this final round, the DN omitted all direct references to CCSC. However, Defendant's intentions regarding CCSC's role in this project are made plain by the following passage in the DN:

> Policy also directs the forest to enter into agreements with state governments, local governments or private organizations to provide for cost-sharing for target range design, construction, operation and maintenance, with title to the target range improvements remaining with the government.

AR 3. Defendanat's DN, FONSI and EA are all silent as to issue of the CCSC's standing with the North Carolina Secretary of State. Answer (Dkt #4) ¶ 48-50.

Clay County is one of North Carolina's tiniest counties, harboring .1% of the state's population (10,618 people in 2012) and just .4% of the state's land (215 square miles). AR 330, 319-21. As Defendant's EA describes, all of Clay County's adjoining counties offer shooting range options for Clay County residents. AR 13. The shooting range in neighboring Towns County, Georgia provides area gun enthusiasts with shooting options within a convenient, reasonable driving distance of Clay County's population centers. *See, e.g.,* AR/2 3229. Plaintiff John McGuinness' repeated test drives indicated that the Chatuge Gun Club, Inc.'s Towns County facility is a 25-minute drive from the Clay County seat of Hayesville, while the Perry Creek site is a 36-minute drive from same. AR 533. The Chatuge Gun Club, Inc. provides bi-weekly shooting access for the general public, and 7-day-a-week access for anyone willing to join the Chatuge Gun Club at one of their regular monthly meetings, pay nominal dues, and agree to follow club rules. AR 323, 325. The Chatuge Gun Club shooting range also offers certified instructors on site at its facility, and it is always welcoming new members. AR/2 3229; AR 328.

In its EA, Defendant described the purpose and need for the Project in the following way:

> The purpose of the proposal is to provide a safe and environmentally sound and secure public shooting facility to serve the local community of Clay County, North Carolina. The need for the proposal is to address the lack of a facility that is designed to minimize the impacts to physical, biological and social resources. A related need is for a shooting facility that is closer to the population centers of Clay County to meet the needs of local residents. *The EA responds to the CCSC's request by developing and evaluating alternatives related to the proposed action and analyzing and disclosing the effects to the environment associated with each alternative.*

AR 13 (emphasis added). Defendant supports this statement of need, in spite of the availability of numerous nearby existing shooting facilities that serve Clay County residents with the observation that "some members of the public feel those ranges are not close enough to fully serve the local community." *Id.*

In its EA, Defendant included three project alternatives, designating the "No Action" alternative as "Alternative A," (hereafter, "Alt. A") the Perry Creek site for the Project as "Modified Alternative B," (hereafter, "Mod. Alt. B") and a Chestnut Branch location as "Alternative C." (hereafter, "Alt. C") AR 21-23. In its DN, Defendant claims that:

> [i]n addition to Alternative B (Modified), I considered two other alternatives in detail: Alternative A – No Action and Alternative C – Chestnut Branch Location. A comparison of these alternatives can be found in Section 2.3, Chapter 2.

AR 3. Revealingly, the EA's Section 2.3 of Chapter 2, entitled "Alternative Comparison," consists solely of a table comparing and contrasting Alternatives B and C; and it omits any reference to Alternative A whatsoever. AR 26. Six of the EA's nine tables comparing and contrasting the impacts and benefits of the various alternatives omit any reference to Alternative A whatsoever. AR 26, 37, 44, 45, 56, 114. Generally, these tables provide unique information and opportunities for comparative analysis that are not found elsewhere in the EA. *Id.*

In its DN, Defendant acknowledged the reason why it rejected Alt. A:

> I did not select this alternative because it would not have met the purpose and need to provide a safe and environmentally sound and secure public shooting facility designed to contain lead and noise as described in sections 1.3 and 2.1.2 of the EA.

AR 4. Two alternative locations that had been considered prior but were eliminated from detailed consideration in the EA were the Birch Cove site ("Alternative 1"), and the Bob Branch site ("Alternative 2"). AR 25. Alternatives 1 and 2 were both eliminated from consideration "over concern the shooting noise would be a nuisance to people residing in the area." *Id.* In its DN, Defendant selected Mod. Alt. B. AR 2.

The Perry Creek site selected in Mod. Alt. B is a forested site approximately 1,300 feet from Passmore Spur Road, which lies near the end of Nelson Ridge Road in Clay County, North Carolina, in the Tusquitee District of the Nantahala National Forest. AR 2, 11, 14-15. Numerous homes line the lower stretches of Nelson Ridge Road. AR 876, 1138. The closest private residences, the homes of two of the Plaintiffs in the present action, lie 1.58 and 1.64 miles northwest of the Perry Creek site. AR 1154, 692, 688. Owners of 25 building lots along Nelson Ridge Rd. report that their most desirable lots are within a half-mile of the Perry Creek site. AR2/ 2352.

Numerous area landowners expressed their dismay to Defendant over the prospect of having their investment in land - and their ability to use and enjoy their land in the way that they wish - ruined by the Project. *See, e.g.,* AR/2 2352-54, 2365, 2367, 2791-2, 2680, 2566, 3389, 3413, 2626. A local realtor protested to Defendant that property values in the Tusquittee Valley – the highest in Clay County – would certainly be depressed by the implementation of the Project:

> As a REALTOR, I would be obligated to disclose the possibility of gun fire reports to every client looking to buy in the Tusquittee Valley as it would be a material fact that REALTORS are required to disclose to be complaint with NC Real Estate Commission Laws. This disclosure would undoubtedly lessen the desirability of the area and depreciate land values in the Tusquittee Valley, which would not be beneficial to the tax base of Clay County.

AR/2 3210 (emphasis in original). A local vacation cabin rental manager fretted over the lost customers that the Project's noise would drive away. AR/2 2550. Ultimately, every source of information that Defendant consulted or received on the topic of property values – including a scholarly law review article - indicated a strong likelihood that the Project would harm property values throughout the surrounding area. *See, e.g.,* AR 694, 786, 788, 343-51.

Defendant's EA excluded property value impacts from detailed review thusly:

> This is not a key issue because it is not supported by scientific research. The Forest Service searched the literature and consulted with social scientists and legal experts and could not find scholarly research proving a direct and statistically significant link that shooting ranges devalue surrounding property.

AR 19. In fact, the record memorializes only one attempt that Defendant made to reach out to an expert for guidance on the property values issue. AR 694. Ken Cordell, PhD, Project Leader at the Forest Service's Forestry Sciences Laboratory, responded that while he did not know of research regarding the impacts of shooting ranges on property values, there was other scholarly research available regarding area noise impacts on property values. *Id.* Dr. Cordell closes with a less scientific and more common-sense perspective: "[f]rom personal experience I would say shooting is very much an impact, especially because it tends to be heaviest on weekends . . ." *Id.*

Nelson Ridge Road, the only vehicular access route to the Perry Creek site, is a one-lane gravel road with turnouts for passing; numerous blind curves, steep drop-offs, and multiple private driveway turnoffs along the first half-mile of the road, over which Defendant possesses an easement for ingress and eagress. Answer (Dkt #4) ¶ 74; AR 563, 304-12. An independent dust report commissioned by Defendant describes the terrain:

> Topography in the area is extremely steep – the sloping side of the road is better described as a cliff and can have a gradient of 40-60+% in places. The five houses in the area of concern are all downhill from Nelson Ridge Road, and their minimum distance from the road ranges from approximately 20-400'. . . There are a few houses uphill of Nelson Ridge Road, but they are not considered . . .

AR 875. Defendant's Transportation Analysis Process ("TAP") for the Project indicates that the major uses of Nelson Ridge Road are "[a]ccess to hiking and equestrian riding, hunting and fishing, and dispersed recreation. During winter months, hiking, biking, and equestrian riding on the road itself." AR/2 2068. Access for logging is also listed as a major use of the road. *Id.* For reasons unknown to current Forest Service staff, the agency currently manages the section of the road past the first half-mile under a seasonal closure whereby vehicular access is prohibited between January 1 and March 31 of each year. AR 994. According to Defendant's TAP, the foremost risk associated with the use of the road is that "insufficient maintenance will result in resource damage or hazards to public safety." *Id.*

Based on public comments received, Defendant's EA identifies traffic safety along Nelson Ridge Road as a "Key Issue" with regards to the Project's impacts on the human environment. AR 83. During the NEPA process, Defendant received numerous comments from residents along Nelson Ridge Road, conveying public safety concerns about the current state of the road and how the Project would exacerbate those problems. Ronnie and Jess Clampitt, Plaintiffs in this action, complained of poor road maintenance by Defendant and warned Defendant about how the road's poor condition had given rise to the road's history of dramatic – and at one time fatal – logging truck accidents. AR 449, 458. Mr. and Mrs. Jay Clampitt, told of how recent growth in the area had increased traffic pressures on Nelson Ridge Road, complained of some "near misses" of their own on the road, and explained why the road is so much more dangerous to drive on during the winter months. AR/2 2568-69. Robert and Earlene von der Osten, Plaintiffs in this action, described having already lost their ability to enjoy walks along the road due to sharing the road with drivers attempting to navigate the dangerous driving conditions present there, and described recently having narrowly averted a high-speed 3-car accident along the winding, narrow road. AR 540, 509. Barbara von der Osten observed how "children, grandchildren and pets" visit often and enjoy long walks on the road, and how non-resident drivers along the road are far less careful and courteous drivers than are area residents, worrying how the influx of new non-resident drivers produced by the Project along the road would exacerbate these public safety concerns for local residents. AR 490. Many local residents stated that the road could not be made safe for the proposed purpose, especially during the winter months. AR 563, 449, 458, 509.

Defendant was notified that the increased traffic caused by the Project would increase road maintenance costs for residents, who maintain the road out of necessity due to a lack of adequate maintenance by Defendant. AR 561; AR/2 2371. Defendant was also notified by its engineers and the public that planned development along Nelson Ridge Road risked causing Defendant's daily vehicle-per-day capacity for the road to be exceeded, which would require more frequent maintenance. AR 86[2]; *See, e.g.,* AR/2 2352-53, 3270. In acknowledging this possibility, Defendant's EA states that "road users," such as area residents, would be responsible for any resulting needed improvements:

> Forest Service engineers note that a well maintained single lane gravel road with turnouts can accommodate 100 vehicles per day before reaching the threshold

[2] In the AR, this page has no Bates stamp, and so is labeled as simply page "76."

> where further traffic load analysis needs to occur (Hicks 2010). Based on the current and projected traffic figures, the Forest Service believes that Nelson Ridge Road can safely absorb range-related vehicular use in addition to current use. If development of private property along the beginning of Nelson Ridge Road occurs, vehicular use could exceed 100 cars per day. At that point road users would need to consider taking action to accommodate higher levels of use.

AR 86. Defendant does acknowledge the potential for Mod. Alt. B producing "increased frequency of encountering opposing traffic . . . [and] impacts to the road prism that would require more frequent grading and maintenance." *Id.* But again, Defendant's analysis appears to absolve Defendant of any increased maintenance responsibilities for Nelson Ridge Road:

> If traffic volumes reach a point where safety is compromised, or where users routinely encounter opposing vehicles, property owners and easement holders would have to decide if the road needs to be widened or transferred to the North Carolina Department of Transportation for administration and maintenance.

AR 87. The EA includes no quantitative measure of the road maintenance cost impacts of Mod. Alt. B to residents or to Defendant, and the DN is silent on the issue as well. AR 83-87, 1-7. The EA and DN contain no analysis of the physical, safety or cost impacts of lifting the seasonal closure of Nelson Ridge Road during the winter months. *Id.*

Defendant's EA claims that "traffic calming measures such as broad based dips, posted speed limits, stop signs, and other design criteria to limit the speed of vehicles on the road would be developed if the action alternative is selected." AR 18. However, the only mitigation measure for Nelson Ridge Road that Defendant's DN commits the Forest Service to implementing as a part of Mod. Alt. B is the posting and enforcement of speed limits. AR 2. Defendant's EA offers no explicit analysis of the effects of any specific traffic mitigation measures on project impacts. AR 83-87.

The Chunky Gal Trail, Clay County's most popular hiking and horseback riding destination, lies within .5 miles of the Perry Creek site. AR 79-80, 1154, 660, 531, 528. The

Chunky Gal Trail is Clay County's only connector trail to the Appalachian Trail, and provides access to the popular Fires Creek Rim Trail. AR 531. Protection efforts for the lands along the Chunky Gal Trail have attracted the instrumental involvement of the Land Trust for the Little Tennessee, and Mary Noel, former Staff Officer and Director for Planning and Lands for the National Forests in North Carolina, called the recreation offered by the Chunky Gal Trail a "unique backcountry experience." Answer (Dkt #4) ¶ 54. The Chunky Gal Trail runs about 1,000 feet of altitude above the Perry Creek site, but directionally, would be in the direct line of fire contemplated by Mod. Alt. B for that site. AR 14-15[3], 78.

Based on public comments received, Defendant's EA identifies noise impacts on area residents and noise impacts on the solitude experience of hikers along the Chunky Gal Trail as two "Key Issue[s]" with regards to the Project's impacts on the human environment. AR 17. Several rounds of gunfire noise analysis were carried out by Defendant, Plaintiffs and independent parties for Mod. Alt. B. In 2008, Defendant carried out a firearms discharge test without the involvement of sound experts. AR 72. In 2010, after public objections regarding the validity of the 2008 test, Defendant hired sound consultants Schomer and Associates, Inc. to perform sound modeling and analysis for the site. AR 73. These experts indicated that "[t]he Chunky Gal trail will experience clearly noticeable, possibly bothersome gunfire noise" from the Perry Creek site, and that Mod. Alt. B would impact trail users with 5 dB more noise than would Alt. C. AR 660. In 2012, after public objections regarding the accuracy of the 2010 analysis, Defendant teamed up with citizen listeners - but no sound experts - to observe gunfire noise from

[3] In the EA's first detailed map showing the location of Mod. Alt. B (AR 15, Fig. 2), the image appears to have been damaged or altered. Compare to the image at AR 78.

the Perry Creek site at residential locations in the area, as well as along the Chunky Gal trail. AR 74.

The record contains a shooting range noise study by sound engineers with the Royal Canadian Mounted Police, which advises Defendant that "[a]ssessment of the annoyance of the sound from firearms" begins with one of two methods for measuring "impulsive sound" from firearms: measuring the "Leq" and measuring the "impulse (or peak) meter response." AR 836-37. The study also cautions that "impulsive sound" like gunfire differs from other sounds in its effects on people "because of the startling effect such noise can have." AR 835. The study indicates that impulsive sound can evoke a "startle reflex," triggering a fight-or-flight response, and that prolonged exposure to such sound can lead to a deterioration in health. AR 831. In the 2012 sound test, Defendant directed citizen listeners to describe the gunfire noise they heard solely based on descriptors such as "louder than a whisper," and "louder than low conversational speech." *See, e.g.,* AR 688-89. Gunfire noise was reported by listeners at three residences in the area. AR 75. Listeners on the Chunky Gal Trail reported gunfire "almost as loud as shouting," that "reverberated and echoed for a period after firing stopped, approximately as loud as the initial sounds of gunfire but diminishing over time . . . " AR 75-76.

The EA concludes that noise impacts to area residents from Mod. Alt. B would be "analogous to normal conversational speech." AR 76. The EA concludes that Chunky Gal Trail hikers and horseback riders would hear gunfire "almost as loud as shouting" for an estimated two (2) to three (3) miles along the trail. *Id.*, AR 80. The EA also dismisses the significant sound impacts observed in the 2012 test by attributing them to the rate of gunfire deployed during the test, and by explaining that Forest Service experience with other, unspecified shooting ranges has shown that "such very heavy events seldom occur, and when they do, they are of short duration."

AR 76. The DN indicates that Alt. C was rejected in part because of nuisance noise impacts to residents near the Chestnut Branch site, and supports its FONSI by stating that "three sound tests for Alternative B (Modified) show minimal nuisance noise from the Perry Creek location, even in the absence of sound management features . . ." AR 4, 3.

In 2012, one final round of noise analysis was performed by sound experts Merck & Hill Consultants, Inc. ("Merck"), who were hired by Plaintiffs to respond to the EA's noise impacts assessment and site selection conclusions. AR 340. Merck takes issue with Defendant's methodology and conclusions regarding audibility and gunfire rates:

> The rate of gunfire discharges does not affect the level of individual peaks and, therefore, does not address the relative audibility. No sound level measurements of the gunfire were taken at any of the listening locations, so there is no way to compare the relative impacts of fewer or greater discharge rates.

AR 341. Merck also points out the contradiction in Defendant's EA between eliminating Alternatives 1 and 2 due to nuisance noise concerns, and then describing noise impacts to residents and recreationists arising from Mod. Alt. B in terms of "normal conversational speech," which ignores the unique psychological and physiological impacts of gunfire noise. *Id.* Merck also points out that Defendant's 2012 noise test results indicate significant nuisance noise impacts to users of the Chunky Gal Trail. *Id.* Defendant's DN is predicated in part on this statement from the FONSI: "The effects on the quality of the human environment are not likely to be highly controversial because there is no known scientific controversy over the impacts of the project . . ." AR 5.

Defendant provides a list of hypothetical noise mitigation measures for Mod. Alt. B in its DN, but commits to carrying out none of them:

> Design measures to reduce nuisance gunfire noise include incorporating sound baffling components into range structures, vegetation, and landscaping and establishing operational policies for the facility, such as limiting the caliber of

> firearms that are allowed, among others. *The Forest Service has not committed to specific design criteria* at this time because the agency wants to preserve the full spectrum of approaches to manage sound and be able to incorporate the most effective measures to reduce noise impacts from the site.

AR 2 (emphasis added). The EA is equally noncommittal with regards to noise mitigation measures, providing a similar list of general types of mitigation and then adding that "[t]hese techniques can be used alone or in combination, depending on the needs and issues of specific ranges. Some or all of these approaches could be used to reduce noise." AR 23-24. In contrast, the EA's description of its specific lead mitigation measures is preceded by enforceable language: "The following design criteria for lead management at both sites *would be implementated* . . ." AR 24(emphasis added). Defendant's EA offers no analysis of any specific noise mitigation measures, only pledging to manage noise "as needed." AR 72-77.

II. STATEMENT OF THE LAW

A. THE NATIONAL ENVIRONMENTAL POLICY ACT

"NEPA declares a broad national commitment to protecting and promoting environmental quality. To ensure this commitment is infused into the ongoing programs and actions of the Federal Government, the act also establishes some important action-forcing procedures." *Robertson v. Methow Valley Citizens*, 490 U.S. 332, 348 (1989)(internal quotations omitted); *see also* 42 U.S.C. §4331. NEPA's disclosure goals are two-fold: (1) to ensure that the agency has carefully and fully contemplated the environmental effects of its action, and (2) to ensure that the public has sufficient information to challenge the agency. *Robertson*, 490 U.S. at 349. By focusing attention on the environmental consequences of its proposed action, NEPA "ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed and the die otherwise cast." *Id.*

NEPA requires an Environmental Impact Statement (EIS) for any major Federal action that may significantly affect the quality of the human environment. 42 U.S.C. §4332(2)(c); 40 C.F.R. §1502.3; *see, e.g. DOT v. Public Citizen*, 541 U.S. 752, 757 (2004). An agency's decision not to prepare an EIS must be reasonable under the circumstances, when viewed in the light of the mandatory requirements and the standards set by NEPA. *Mt. Lookout - Mt. Nebo Prop. Protection Ass'n v. FERC*, 143 F.3d 165, 172 (4th Cir. 1998). NEPA requires agencies to take a "hard look" at a project's potential environmental effects. 42 U.S.C. §4332(2)(c); *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 374 (1989). Agencies must disclose all direct and indirect, foreseeable impacts from projects. 40 C.F.R. §1502.16; *City of Davis v. Coleman*, 521 F.2d 661, 676 (9th Cir. 1975). NEPA requires a federal agency to consider all relevant factors relating to the direct and indirect effects of the proposed project, and to articulate a rational connection between the facts found and the choice made. *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 105 (1983).

The Court reviews an EA and FONSI to determine whether an EIS should have been prepared under the standard of whether the agency acted arbitrarily and capriciously in concluding that the proposed action "will not have a significant effect on the human environment." *Humane Soc'y of United States v. Hodel*, 840 F.2d 45, 62 (D.C. Cir. 1988). Under NEPA regulations, an agency undertaking an action is required to determine whether its proposal is one that normally requires or normally does not require an EIS. 40 C.F.R. § 1501.4(a). If the answer to this question is not clear cut, the agency should prepare an EA. 40 C.F.R. § 1501.4(b). If the agency determines, based on the EA, that no EIS is needed because its action would not significantly affect the environment, it may then prepare a FONSI. 40 C.F.R. §§ 1501.4(e), 1508.13. Otherwise, it must prepare an EIS. 42 U.S.C. §4332(2)(c); 40 C.F.R. §1502.3. If "*any* 'significant' environmental impacts might result from the proposed agency action, then an EIS must be prepared *before* the action is taken." *Sierra Club v. Peterson*, 717 F.2d 1409, 1415 (D.C. Cir. 1983) (emphasis in original); *see also, e.g.*, *North Carolina v. FAA*, 957 F.2d 1125, 1131 (4th Cir. 1992).

The CEQ Guidelines at 40 C.F.R. §1508.27 define "significantly" for purposes of NEPA, requiring reviewing agencies to examine the "context" and "intensity" of impacts. The context of the action includes "society as a whole (human, national), the affected region, the affected interests, and the locality." 40 C.F.R. § 1508.27(a). One of the intensity factors that must be reviewed is: "(4) [t]he degree to which the effects on the quality of the human environment are likely to be highly controversial." *Id.* This Court has suggested that the controversy at the heart of this inquiry boils down to "the existence of a substantial dispute . . . as to the size, nature, or affect of the major federal action . . ." and not simply the existence of public opposition to the project. *Global Sustainability Incorporated's Forest Protection v. McConnell*, 829 F. Supp. 147, 153-54 (W.D.N.C. 1993)(*Citing Found. for North Am. Wild Sheep v. United States Dep't of Agric.*, 681 F.2d 1172, 1182 (9th Cir. 1982)).

Under NEPA, information used by the agency for its review of environmental impacts must be of high quality. 40 C.F.R. §1500.1(b). Scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. *Id.* The NEPA regulations also require agencies to ensure the scientific integrity of the discussions and analyses. 40 C.F.R. §1502.24. NEPA analysis "must be taken objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made." *Metcalf v. Daley,* 214 F.3d 1135, 1142 (9th Cir. 2000). And an EA is not designed to substitute for an EIS, no matter how 'beefed up' the EA may be. *Sierra Club v. Marsh*, 769 F.2d 868, 875 (1st

Cir. 1985). In *Marsh*, federal agencies involved prepared expansive EAs over a period of years, indentifying the project's environmental impacts, and producing FONSIs concluding that the impacts would be insignificant. After reviewing the voluminous EAs, Judge (now Justice) Breyer, writing for the First Circuit panel, wrote:

> At most [the EA's] show the practical wisdom of CEQ's advice: the agencies would have saved time in the long run had they devoted their considerable effort to the production of an EIS, instead of the production of documents seeking to prove that an EIS is not needed.

Id.

The determination of a project's purpose and need is the starting point in compliance with NEPA, and it establishes the range of alternatives to be considered. 40 C.F.R. § 1502.13. To that end*,* a federal agency is prohibited by NEPA from defining the project's purpose so narrowly that competing reasonable alternatives are defined out of consideration. *Simmons v. United States Army Corps of Eng'rs,* 120 F.3d 664, 666 (7th Cir. 1997). NEPA requires agencies to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E). NEPA regulations require that "[f]ederal agencies, shall, to the fullest extent possible: [u]se the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment." 40 C.F.R. § 1550.2(e). The purpose of this "rigorous" analysis is to "provid[e] a clear basis for choice among options by the decision maker and the public." 40 C.F.R. 1502.14; *see also* 42 U.S.C. § 4332(2)(E); 40 C.F.R. §§ 1507.2(d), 1508.9(b). In projects where an applicant has asserted a need for a project to the reviewing agency, the agency has a "duty under NEPA to exercise a degree of skepticism in dealing with self-serving statements from a prime beneficiary of the project," and has a duty to avoid "wholesale acceptance" of the applicant's definition of the project's purpose and need, and to independently consider the reasonable alternatives that could satisfy the general goal of the applicant. *Simmons* 120 F.3d at 669 (internal quotation omitted).

If an agency seeks to justify a FONSI based on mitigation measures, which in turn are projected to keep project impacts below the threshold of significance, then the NEPA analysis needs not explicate the proposed mitigation measures to the finest detail, but what is required is something more than a "purely perfunctory or conclusory" listing. *Ohio Valley Envtl. Coalition v. Aracoma Coal Co.*, 556 F.3d 177, 206 (4th Cir. 2009)(*Citing O'Reilly v. U.S. Army Corps of Engr's*, 477 F.3d 225, 231 (5th Cir. 2007)).

B. NORTH CAROLINA STATUTORY AND CASE LAW

North Carolina's Secretary of State may suspend a corporation's articles of incorporation for failure to file any report or return; or for failure to pay any tax or fee required by Subchapter 1 of Chapter 105 of the North Carolina General Statutes, for 90 days after it is due. N.C.G.S. § 105-230(a). Any act performed or attempted to be performed by the suspended corporation during the period of suspension is invalid and of no effect. N.C.G.S. § 105-230(b).

"A binding contract is created by an agreement involving mutual assent of two parties who are in possession of legal capacity, where the agreement consists of an exchange of legal consideration (mutuality of obligation). *Creech v. Melnik,* 147 N.C. App. 471, 477 (2001)(*citing* Richard A. Lord, Williston on Contracts § 1:20 (4th ed. 1993)).

III. ARGUMENT

A. STANDARD OF REVIEW

Federal Rule of Civil Procedure 56 provides that summary judgment shall be granted if "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Summary judgment is a particularly useful method of reviewing federal agency decisions, because the sole question at issue is a question of law, and the underlying material facts are contained in the administrative record. *Am. Arms Int'l v. Herbert*, 563 F.3d 78, 86 (4th Cir. 2009). The Court's role in this case is to determine whether judgment as a matter of law is appropriate for either party, in light of the standard of review prescribed by the Administrative Procedures Act ("APA"), NEPA, North Carolina General Statutes, and interpretive case law.

The determination of whether a defendant violated NEPA or North Carolina state statutes is based upon the APA, which states that "[t]he reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be . . . (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . ." 5 U.S.C. § 706(2)(A). The Supreme Court has defined arbitrary and capricious in this context as follows:

> [A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies; we may not supply a reasoned basis for the agency's action that the agency itself has not given.

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Ins. Co., 463 U.S. 29, 43 (1983) (quoting *SEC v. Chenery Corp*., 332 U.S. 194, 196 (1947)). The Court generally bases its review under the APA on the record that was before the agency at the time of its decision. 5 U.S.C. § 706; *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419-21 (1971).

B. DEFENDANT'S RANGE OF ALERNATIVES ANALYSIS SUBVERTS NEPA

"*I have come to realize that the USFS wants this shooting range at Perry Creek awfully bad.*" AR 561(emphasis added). These are the words of Plaintiff, area resident and longtime project adversary Jess V. Clampitt, Jr. in a letter to Defendant penned on September 9, 2013. They are among the most emblematic words to be found in the 3,485 pages of the record. One of the ways that Defendant demonstrated its fierce desire for the Project at Perry Creek was the way that Defendant used its EA and DN to arbitrarily and capriciously subvert NEPA by treating the alternatives analysis process as an afterthought to be molded around a pre-determined outcome. Defendant achieved this subversion first by defining the purpose and need for the project so narrowly that competing reasonable alternatives were defined out of consideration; and then by failing to provide a rigorous comparative analysis of all reasonable alternatives to Mod. Alt. B.

Defendant claims that the Project was initiated in response to demand for a local shooting facility by CCSC, and defines the purpose and need for the Project as "to provide a safe and environmentally sound and secure public shooting facility" in close proximity to the population centers of Clay County. AR 13. For eleven years, over three rounds of NEPA analysis, and an in spite of all the evidence in the record to the contrary, Defendant "accepted wholesale" the self-serving statements of CCSC with regard to the purpose and need for an additional local facility, and failed to exercise appropriate skepticism and independent judgment regarding reasonable alternatives for achieving CCSC's goals. *Id. See also, Simmons* 120 F.3d at 669; AR 533, 323, 325, 328; AR/2 3229; Answer (Dkt #4) ¶ 21. Defendant's EA then revealed Defendant's lack of seriousness about analyzing Alt. A by failing to provide a rigorous comparative analysis of all reasonable alternatives to Mod. Alt. B, leaving Alt. A out of a majority of comparative analysis tables in the EA entirely. 40 C.F.R. 1502.14; *see also* 42 U.S.C. § 4332(2)(E); 40 C.F.R. §§ 1507.2(d), 1508.9(b); AR 26, 37, 44, 45, 56, 114. Finally, Defendant's DN nakedly admits that Alt. A was not selected for the sole reason that it would not have resulted in the construction of a shooting range. AR 4. In doing so, Defendant interprets its own purpose and need so narrowly that Alt. A was automatically defined out of consideration, denying the public a "clear basis for choice among options." *Simmons* 120 F.3d at 666; 40 C.F.R. 1502.14.

Therefore, Defendant's EA and DN are agency actions which are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

C. DEFENDANT FAILED TO PRODUCE AN EIS REQUIRED BY NEPA, AND INSTEAD RELIED ON A FAULTY EA, DN AND FONSI

Defendant has violated NEPA, 42 U.S.C. §§ 4331-4337, by failing to prepare an EIS for the Range in spite of great controversy over, direct evidence of, and at a minimum, uncertainty over whether the proposed project will inflict significant impacts on the human environment. Defendant instead relies on an arbitrary and capricious EA, DN and FONSI, which each amount to an abuse of discretion and are otherwise not in accordance with law. Defendant failed to acknowledge that the requirement to prepare an EIS had been triggered at many stages throughout the NEPA analysis process, including the following:

1) After Alternatives 1 and 2 were eliminated from consideration due to concerns about nuisance noise impacts to area residents; after Defendant's independent sound experts informed Defendant that Chunky Gal Trail users will experience "clearly noticeable, possibly bothersome" gunfire noise from Mod. Alt. B; after Defendant's sound tests found gunfire "almost as loud as shouting" impacting the Chunky Gal Trail for an estimated 2-3 miles; and after Plaintiffs' independent sound expert informed Defendant that these trail impacts were likely to be

"significant": Defendant's DN supports its FONSI with the claim that "three sound tests for Alternative B (Modified) show minimal nuisance noise from the Perry Creek location, even in the absence of sound management features." AR 25, 660, 75-76, 80, 341, 3. This representation runs counter to the evidence before the agency, and renders the FONSI arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n,* 463 U.S. at 43.

2) Defendant's EA dodges its own 2012 sound test findings of significant gunfire noise impacts to the Chunky Gal Trail by attributing the noise levels observed to the rate of gunfire. AR 76. Independent sound expert Merck informed Defendant that there is no relationship between the rate of gunfire and the audibility of the "peaks" of gunfire sound. AR 341. This reliance on low-quality, unexpert analysis and willful ignorance of available scientific expertise in the record renders the EA an arbitrary and capricious abuse of discretion. *Motor Vehicle Mfrs. Ass'n,* 463 U.S. at 43. 40 C.F.R. §1500.1(b); 40 C.F.R. §1502.24.

3) After eleven years of vociferous and unwavering opposition by large numbers of local residents and recreational users of the Chunky Gal Trail; after Defendant's sound testing that indicated dramatic nuisance noise impacts on recreational users along two (2) to three (3) miles of trail; and after Defendant's receipt of expert sound consultant input that directly controverts Defendant's unexpert analysis, the FONSI arbitrarily concluded that no EIS would be prepared, in part because "[t]he effects on the quality of the human environment are not likely to be highly controversial because there is no known scientific controversy over the impacts of the project." *See, e.g.,* AR 420-21, 449, 528, 540, 560-62; AR/2 2591-2, 2662, 2680, 2707, 2791-2, 3210, 3229; AR 75-76, 660, 341, 5. On its face, Defendant's statement is patently false, due to the dissent from both sound experts involved in commenting on this project. AR 341, 660. Defendant also uses the wrong standard by limiting the FONSI's analysis to "scientific

controversy," arbitrarily and capriciously ignoring all other controversy with regards to the Project. 40 C.F.R. § 1508.27(a); *Global Sustainability Incorporated's*, 829 F. Supp. at 153-54; *Motor Vehicle Mfrs. Ass'n,* 463 U.S. at 43.

4) After suggesting that the burden of any increasing road maintenance costs to the private stretch of road along the first half-mile of Nelson Ridge Road resulting from the Project would be absorbed by "road users" and possibly North Carolina; and after acknowledging that Mod. Alt. B may increase traffic impacts to the road causing an increased need for maintenance; Defendant's EA, Decision Notice and FONSI arbitrarily and capriciously excluded from review any quantitative measurement of road maintenance cost impacts of the project. AR 83-87, 1-7. The decision not to analyze these impacts highlighted by the evidence before the agency renders the EA, DN and FONSI arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n,* 463 U.S. at 43.

5) After every source of information sought by or submitted to Defendant on the subject of project impacts on area property values – including a scholarly article - indicated a strong likelihood of negative impacts resulting from Mod. Alt. B, Defendant arbitrarily and capriciously excluded the Project's impacts on local private property values from analysis on the basis that the agency "could not find scholarly research proving a direct and statistically significant link that shooting ranges devalue surrounding property." *See, e.g.,* AR 694, 786, 788, 343-51, 19. This representation runs counter to the evidence before the agency, and renders the EA, DN and FONSI arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n,* 463 U.S. at 43. No analysis of the project's impacts on local real estate values was carried out in the EA, and hence the Decision Notice and FONSI were reached without any examination of the significance of these impacts. AR 19.

6) The EA, DN and FONSI arbitrarily and capriciously rely on the assumption that unspecified, unexamined and unenforceable sound and traffic mitigation measures will keep project impacts below the threshold of significance. AR 2, 18, 23-24. The Decision Notice states that Defendant is not committed to carrying out any specific sound mitigation measures for the Range, and it only commits Defendant to the posting and enforcement of speed limits for traffic mitigation. AR 2, 23-24. The EA contains no analysis as to whether any of the potential mitigation measures mentioned in passing by Defendant will be effective in preventing significant noise or traffic impacts. AR 72-8, 83-87. The EA and DN's "purely perfunctory or conclusory" listings of potential mitigation measures alone are insufficient to support a FONSI. *Ohio Valley*, 556 F.3d at 206 . The FONSI is therefore arbitrary, capricious, and an abuse of discretion. *Motor Vehicle Mfrs. Ass'n,* 463 U.S. at 43.

Defendant failed to prepare an EIS for the Project as required by law, in spite of the abundant evidence before the agency that the Project threatened significant environmental impacts. 42 U.S.C. §4332(2)(c); 40 C.F.R. §1502.3; *see, e.g. Public Citizen*, 541 U.S. at 757. Defendant's decision not to prepare an EIS was not reasonable under the circumstances. *see, e.g. Mt. Lookout - Mt. Nebo Prop. Protection Ass'n*, 143 F.3d at 172. For all of the reasons, *supra*, the EA, DN and FONSI are agency decisions that are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Motor Vehicle Mfrs. Ass'n,* 463 U.S. at 43.

D. DEFENDANT VIOLATED STATE LAW IN APPROVING PROJECT

Defendant's EA is crystal clear that Defendant is analyzing a proposal to partner with CCSC to implement the Project. AR 12-13. After Defendant documented its knowledge of the CCSC's suspension by the North Carolina Secretary of State pursuant to N.C.G.S. § 105-230(a) and N.C.G.S. § 105-230(b); and after Defendant was warned by its staff that CCSC's suspension would have to be cleared by the Secretary of State before Defendant could partner with them; and after Defendant was warned by its staff to document in the DN its rationale for approving the project in spite of the suspension, Defendant issued its DN approving Defendant's explicit intent to form a bilateral contract with CCSC for the construction and perpetual maintenance of a shooting range on Defendant's land. AR 300, 1151-52, 640, 2. Instead of documenting Defendant's rationale for approving the arrangement with CCSC, Defendant's DN instead excludes any mention of CCSC whatsoever.

During CCSC's period of suspension, any act or attempted act of the CCSC was invalid and of no effect, per N.C.G.S. § 105-230(b). AR 294-97. Therefore, CCSC was not competent to enter into a contract with Defendant, and Defendant knew this. *Creech,* 147 N.C. App. at 477. Defendant's DN was issued in pursuit of what Defendant knew to be at the time an invalid contract. As such, Defendant's DN was arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law. *Motor Vehicle Mfrs. Ass'n,* 463 U.S. at 43.

CONCLUSION

For the reasons stated above, Plaintiffs respectfully request the Court to grant its Motion for Partial Summary Judgment, grant the Prayers for Relief referenced therein, and hold unlawful and vacate the DN, FONSI and EA.

Respectfully submitted this, the 31st day of May, 2016.

s/ Perrin W. de Jong
Perrin W. de Jong, N.C. Bar No. 42773
Attorney for Plaintiffs
Perrin W. de Jong, Attorney at Law
P.O. Box 6414
Asheville, NC 28816
Telephone: (828)252-4646
Facsimile: (888)277-4929
Email: perrin@dejonglawfirm.net

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing by properly filing the foregoing with the Clerk of Court using the CM/ECF system, and through which an email notice of this filing will be sent to all parties indicated on the electronic filing receipt; or by first class U.S. mail, postage prepaid, and properly addressed to:

Jill Westmoreland Rose
Acting U.S. Attorney
Paul B. Taylor
Assistant U.S. Attorney
Room 233, U.S. Courthouse
100 Otis Street
Asheville, NC 28801-2611
Paul.taylor@usdoj.gov

Matthew A. Tilden
Attorney
Office of the General Counsel
1718 Peachtree Street, NW, Suite 576
Atlanta, GA 30309-2437
Matthew.tilden@ogc.usda.gov

This, the 31st day of May, 2016.

s/ Perrin W. de Jong
Attorney for the Plaintiffs